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No. 363

In the Supreme Court of the United States

OCTOBER TERM, 1933

THE ARROW-HART & HEGEMAN ELECTRIC COMPANY,
Petitioner.

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER:

CHARLES NEAVE,
ARTHUR F. MULLEN,
ARTHUR L. SHIPMAN,
CHARLES WELLES GROSS,
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Counsel for Petitioner.

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CORRECTION

This brief has been reprinted to correct typographical errors on pages 4, 28 and 52. Otherwise the brief is the same.

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BRIEF FOR PETITIONER

This proceeding comes before this Court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit which acted upon a petition to review an order to divest issued by the Federal Trade Commission under the last paragraph of Section 7 of the Clayton Act.

The Circuit Court of Appeals delivered two opinions. The first opinion relates to two motions and is reported in 63 F. (2d); 108; R. 1056. The second opinion (Judge Swan dissenting) directs itself to the merits of the case and is reported in 65 F. (2d) 336; R. 1060.

The order of the Federal Trade Commission is at R. 261, and Chairman Humphrey's dissent is at page 264.

JURISDICTION

The writ of certiorari was filed and issued under Section 240 (e) of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA sec. 347) and in accord-

ance with Section 350 of that Code and Article 38 of the Rules of this Court.

BRIEF STATEMENT OF THE CASE

This is a proceeding by the Federal Trade Commission alleging violation of section 7 of the Clayton Act (15 USCA, sec. 18), the pertinent paragraph of which section reads:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The petitioner is a Connecticut corporation formed on December 31, 1928 by the merger of two small manufacturing companies in Hartford, making small electrical apparatus generally classed as "wiring devices" such as lamp sockets, plugs, switches, receptacles, wall plates, shade holders, etc. It has no monopoly or control of the business and indeed there are some 70 competitors, several of them being the largest electrical manufacturing companies in this country.

Of course, if there was anything objectionable about the merger, the Department of Justice is the one to complain under the Sherman Act—not the Federal Trade Commission under the Clayton Act.

But the Commission seeks to assume jurisdiction here (a jurisdiction which was denied by Judge Swan in his

dissent, R. 1067) because of the history preceding the merger.

That is, during a period of fifteen months immediately preceding the merger there was a company which held all of the common stock (but none of the preferred) of the two manufacturing companies. The Commission issued a complaint against that holding company. Before any proceedings were taken under the complaint and with the intention of removing all possible grounds of criticism and of avoiding litigation, the holding company was dissolved and the two manufacturing companies were returned to their original status. Then, and still before any proceedings under the complaint, the two manufacturing companies were merged to form the petitioner.

The Federal Trade Commission was notified and made no objection or protest until five months later when it filed a supplemental petition bringing in as a party the present petitioner, namely, the company resulting from the merger.

The Commission's order is against the merger company only. It requires the petitioner to divest itself of the common stock of one or another of the manufacturing companies (which stock it never owned) and divest itself of the manufacturing plants and properties of one or the other of the manufacturing companies. That order was entered over Chairman Humphrey's vigorous dissent. (R. 264).

It is unquestionably true that prior to the time when the holding company was formed to acquire the common stocks of the two manufacturing companies, those two companies might lawfully have merged (as they did later) so far as concerns the jurisdiction of the Federal Trade Commission.

Was that right of merger lost by reason of the fifteen months' existence of the holding company during which period there was no monopoly, restraint of trade, lessening of competition or injury to the public, particularly when the common stocks of the manufacturing companies, acquired by the holding company, were not voted by that holding company, nor by anyone or any company controlled by it, in effecting the merger?

Before coming to a consideration of the facts in detail, it should be understood that the petitioner has no substantial quarrel with the Commission's findings of fact, so far as they go. There is no real dispute as to the basic facts. The findings of the Commission are, however, inadequate as they omit various of the pertinent facts and only half state others; so they may well lead to erroneous conclusions.

It is well settled that while the Commission's findings of fact, if supported by evidence, are conclusive, the Courts may take into consideration as decisive of the controversy "certain material facts not covered by the findings" (*James S. Kirk & Co.* v. *Federal Trade Commission,* 59 F. (2d) 179, 181), and inquire as to "whether there are certain material facts not reported by the Commission" (*Federal Trade Commission* v. *Curtis Co.,* 260 U. S. 568, 580). And in any event it "remains the duty of the supervising court to determine whether the facts found are such as to warrant the conclusion that the effect of the acquisition of the stock of the two corporations is or may be to substantially lessen competition between them" (*Temple Anthracite Coal Co.* v. *Federal Trade Commission,* 51 F. (2d), 656 (CCA 3).

STATEMENT OF FACTS

The Manufacturing Companies:

The two manufacturing companies, above referred to, were The Arrow Electric Company (which we shall call Arrow) and The Hart & Hegeman Manufacturing Company, (which we shall call Hart & Hegeman).

Both Arrow and Hart & Hegeman had long been manufacturing electrical wiring devices. Each marketed its product nationally, the former under the "Arrow" brand, or trademark, and the latter under the "H. & H." brand, or trademark. While both companies manufactured a general line of electrical wiring devices—i.e., sockets, receptacles, attachment plugs, heater plugs, switches, wall plates, rosettes, shade holders and small accessories—Arrow emphasized, and had a reputation in the trade for, its *socket* line whereas Hart & Hegeman emphasized its *switch* line and was thought of by the trade in general as primarily a switch manufacturer. In addition, Hart & Hegeman, unlike Arrow, manufactured and sold a special line of current control devices, known as "appliance material", for use by other manufacturers in the construction of machinery and electrical appliances, e.g., radios, vacuum cleaners, refrigerators, gasoline pumps, electrical tools, motor operated machinery and the like.

From the standpoint of marketing, the product of Hart & Hegeman was divided into two main classes, namely, "appliance material" and "shelf goods". The product of Arrow came under the sole heading of "shelf goods", that is, those items composing the general line of wiring devices which are ordinarily stocked and distributed by electrical supply distributors. This material is of a standard type and is packed in suitable units for resale, and

it is described in the manufacturer's regular catalogue listings. It is used chiefly in connection with the electrical wiring circuits of buildings and with power or lighting circuits and fixtures generally; hence it was marketed through jobber and contractor channels so as to be everywhere available to the consumer. (R. 310-311).

On the other hand, "appliance material", which was made by Hart & Hegeman and not by Arrow, is not intended for resale, is seldom catalogued, as it is manufactured for a specific purpose, frequently being designed to order or made to the specifications of the purchasing manufacturer who incorporates it into his product as an integral part thereof. The appliance business of Hart & Hegeman was very profitable and year by year had been growing in relative importance. (R. 284, 362-364, 540-544).

With respect to their shelf goods, the two companies were in competition. It appears, however, from the 1927 figures (the only ones introduced into evidence), that 41% of the total business of Hart & Hegeman was not competitive with Arrow's business. (R. 238, 559-560).

At the time of the merger each company was doing an annual gross business of roughly $4,000,000. We give below the exact figures for six and one-half years. These figures also include the post merger period of 1929, 1930 and the first six months of 1931, this being made possible because of the operation of the new company under two separate sales divisions, the "Arrow" and the "H. & H.". (R. 904, 927-928, 963-964).

	Arrow	*Hart & Hegeman*	*Sales of whole industry*
1925:	$4,392,000	$4,242,000	
1926:	4,012,000	4,153,000	
1927:	3,849,000	4,537,000	$32,703,331
*1928:	3,537,000	4,378,000	
1929:	3,584,000	4,599,000	43,120,095
1930:	2,987,000	3,469,000	
1931 (6 mos.):	1,271,000	1,418,000	

Figures for the sales of the whole electrical wiring industry were not available for the year 1928. Those for 1927 and 1929 are from the census figures of the Department of Commerce, which are compiled every other year, and 1931 figures were not available when the evidence was taken. It will thus be seen that in 1927 the combined "Arrow" and "H. & H." business amounted to a fraction over 24% of the total electrical wiring device business of the country and that in 1929 it amounted to less than 19% thereof. (R. 872, 875, 902, 904). The actual trend, as the above figures show, has been away from monopoly.

"Arrow" and "H. & H." products have long been and still are faced with competition of the most formidable order; it is inconceivable that those companies could ever have monopolized the electrical wiring device industry no matter how hard they should try.

Among rival manufacturing concerns in this field are General Electric Company, Bryant Electric Company (a subsidiary of Westinghouse Electric and Manufacturing Company), Pass and Seymour, Incorporated, Harvey Hubbel, Incorporated, Cutler Hammer, Incorpo-

*There is some conflict in the record as to the 1928 sales of Hart & Hegeman. At page 928 thereof, the petitioner's treasurer after having previously testified to the above figure (page 837), gave the 1928 figures as $4,478,000 instead of $4,378,000. The clear weight of evidence, however, supports the latter figure. The difference is, in any event, immaterial.

rated, The Weber Electric Company, Paulding Company and Circle F Manufacturing Company. Each of these companies manufactures and sells nationally a complete line of electrical wiring devices. The first two companies named of course have at their command virtually unlimited resources. In addition to these rival companies, there are a great many others which manufacture and sell nationally limited lines of electrical wiring devices. The fact that a given company does not manufacture a complete line does not indicate that it is insignificant as a competitor. For example, the Leviton Manufacturing Company, which does not have a complete line, nevertheless is the largest manufacturer of sockets in the United States. Again the Alcor Manufacturing Company and the Beaver Company are large manufacturers of switches and plugs, and the Standard Manufacturing Company of Chicago is a large manufacturer of switches. In early 1929 it was estimated that there were nearly seventy companies in this country which manufactured some, or all of the wiring devices manufactured and sold by the petitioner. (R. 875-878, 691-693, 703, 705, 716-718, 725-727, 732-737, 792-795, 813-815, 818, 821, 881, 893, 896, 904-906, 910-917, 923, 924).

Arrow and Hart & Hegeman had a legal right to merge at any time. They had that right in the forepart of the year 1927 and before but, according to the Commission, they did not have it on December 31, 1928—the actual date of the merger—because in October of 1927 a corporation, Arrow-Hart & Hegeman, Incorporated (which we shall call the holding company) was organized to acquire, and did acquire, the common stocks of these two companies. It is the Commission's contention that this acquisition was illegal under Section 7 of the Clayton Act, that such claimed illegality was never purged and

that it somehow carried through to the petitioner, thus giving the Commission a jurisdiction, which it otherwise would not have had, over the petitioner and the power to rend apart the merged corporation. Thus it becomes necessary in this statement briefly to recite the significant facts concerning the formation, life and dissolution of the holding company.

The Holding Company:

The holding company was incorporated in Connecticut in October, 1927, and acquired the *common* capital stocks of Arrow and Hart & Hegeman—the same companies which subsequently merged. It never acquired any of the preferred capital stocks of either of these two companies. (See Commission's Exhibits 68-71, giving lists of preferred stockholders at October 10, 1927 and December 31, 1928. R. 938). When the holding company was organized the issued capital stocks of Arrow and Hart & Hegeman were as follows: (See Findings, R. 231-236).

	Common (par $25)	*Preferred (par $100)*
Arrow	$750,000	$2,000,000
Hart & Hegeman	500,000	1,333,300

Thus nearly 73% of the capitalization of each company was represented in preferred stock. No merger could be voted without the concurring vote of at least two-thirds of the preferred stock. General Statutes of Connecticut, Exhibit J, (R. 219). The preferred stock of both companies was held widely by the general public, the total number of preferred stockholders for the two companies combined being in the neighborhood of one thousand. (Com. Exhibits 68-71, *supra*).

The sole purpose in forming the holding company was to work out a manufacturing affiliation between the two companies. The holding form of company, rather than an outright merger, was advocated since it seemed best calculated to achieve a satisfactory manufacturing affiliation between the two operating companies while at the same time leaving the competitive situation wholly untouched. (R. 440-441; Com. Ex. 17, 18).

The goal of the organizers of the holding company, who were the common stockholders of the two manufacturing companies, was the achievement of manufacturing economies through pooling of engineering and executive talent, through increased volume of production, through elimination of many duplicating and other wasteful operations and, in general, through higher standards of efficiency; their goal was not the stamping out, or lessening, of competition between these two companies. (R. 311-312, 347-350, 354-359, 562, 693, 728-738, 792-795. Com. Ex. 18). Important as was the attainment of economies in an industry where competition was constantly becoming stronger, it was equally important, indeed far more important, for Arrow and Hart & Hegeman to preserve the good will inherent in their two brands, "Arrow" in the one case and "H. & H." in the other, which had been used on their respective goods for many years and had thereby acquired enormous proprietary values. The product of either company would have had little meaning—would have stood little differently from that of a new manufacturer in the field—divorced from its characteristic brand, or trademark. By years of intensive cultivation Arrow had achieved a wide and established market for "Arrow" electrical wiring devices; it could count on no market for unmarked goods, or for goods with other labels, which it might set out

to manufacture. So with Hart & Hegeman. To preserve the value attaching to these brands, it was deemed not only wise, but essential, in order to preserve also the competitive situation existing between the two companies, to preserve intact the two sales organizations each of which would push its brand of goods as before. The holding form of company was particularly well adapted to this objective. This is shown by three classes of testimony,—the testimony of our own men, the testimony of our biggest competitors and the testimony of jobbers. The testimony of our own men appears in R. 340-341, 359-362, 370, 374, 440-441, 443-447, 449-450, 477-478; 539, 792-793, 802, 809-819, 870. The testimony of our competitors, General Electric Company and Westinghouse, appears in R. 691-750. The testimony of jobbers appears in R. 568-581, 593-676, 967-998, 1007-1030.

Actual affiliation of the two companies had its roots in the sudden and unexpected death in February 1927 of the President of Hart & Hegeman. He had been a dominating figure in his company, having kept a close and personal control of its operations. All officers and departments reported directly to him; under him the company could aptly be termed a "one man concern". He and his family owned more than a majority of the common stock of the company. The loss of the president left his company without an assured position in the industry. Although his successor was an able man in financial matters and in sales promotional work, he was not a manufacturer. (R. 350-354).

In view of the situation stated, the president's widow and her advisers decided that, for the best interests of herself and family, their stock should be sold, protection, however, to be extended as far as possible to the employees

and friends who had supported the president in his enterprise. Pursuant to this decision, endeavors were made for several months to find a suitable purchaser for the Hart & Hegeman stock. Although there were diligent efforts to find such a purchaser, no satisfactory offers were received. (R. 352-354).

In July of 1927, and for the first time, informal negotiations were opened between the two manufacturing companies. These culminated in a plan for an affiliation between the two companies through the incorporation of the holding company. The incorporation was as of October 1927. The capital structure of the holding company was $2,000,000 divided into 200,000 shares of one class of stock of the par value of $10 each.

In the latter part of August 1927, both Arrow and Hart & Hegeman sent out letters to their distributors, or jobbers, announcing the new affiliation. The letters of each company were identical in substance and, for the most part, in wording. The Arrow letter was as follows (Commission's Exhibit 18):

"August 25, 1927

"We have just carried through a plan by which the Arrow Electric Company and the Hart & Hegeman Manufacturing Company, both of which as you know have their headquarters in Hartford, are united in the operation of their manufacturing plants.

"This consolidation is expected to be very advantageous for all concerned and we not only feel that you will be interested in receiving early word from us about it, but we want you to get this information direct and not from some possibly unreliable source.

"While cooperating for factory efficiency the companies will continue under separate management and control, with the personnel as at present. It is in the matter of production economy that we aim to realize chiefly the benefits of the consolidation.

"We do not intend to make any changes in respect to the individuality of products. Arrow material will remain Arrow and H. & H. material will remain H. & H.

"We emphasize the fact also that the action does not in any way affect or alter Arrow sales policies. We shall be in active competition with the entire field, for the retention of our present business and acquiring new trade through our sales endeavors. In pursuance of this plan it will not be practicable for us to furnish H. & H. material to our distributors and naturally the reverse is true, that Arrow material will be available only to Arrow distributors.

"We believe these are the only questions which are likely to be of particular significance to you as friends and distributors of Arrow, but if others occur to you we shall be glad to reply to any inquiries. It will be considered a favor if you will give this information to your salesmen and others in your organization where you think it advisable. They will thus be in position to correct any false impressions or misstatements regarding the affiliation.

"Very truly yours,

THE ARROW ELECTRIC COMPANY,

EDWARD R. GRIER,

Vice President."

The life of the holding company was from the date of its incorporation in the early part of October, 1927, to the early part of December, 1928, when it distributed all of its assets, which were the common stocks of the manufacturing companies, and voted itself out of existence.

It is at this point in the Record that we stress particularly the inadequacy of any findings by the Federal Trade Commision as to the conduct of the holding company. With the exception of a brief statement in the first paragraph of Paragraph Sixth of the Commission's Find-

ings (R. 252) there is nothing whatever in their Findings which indicates the manner in which the business of the manufacturing companies was conducted during the period of the holding company, that is, from October 1927 to December 1928. Commencing with the second paragraph of Paragraph Six, at the foot of Page 252, the Commission discusses the period of the merger which took effect January 1, 1929. No differentiation is made between those two periods and there are no findings whatsoever on the point we now discuss.

The Commission, in its brief in the Circuit Court of Appeals, under the heading of "Suppression of Competition" after the holding company was formed, stated that "during the first few months after October 1927", the date of formation of the holding company, "no change was made in the sales policies of the two manufacturing companies, although they were controlled by" the holding company, but that various economies and improvements, to which we have referred above, were effected. Then the brief stated that "on or about January 1, 1930, however, very substantial changes took place in the sales organizations of the two operating companies". But that was *not* during the period of the holding company; the company then in existence was the one resulting from the merger. No facts were found by the Commission upon which could be based a conclusion that there was any suppression of competition by the holding company. So we may take it that there was no lessening of competition under the holding company.*

*We tried, without success, to have the findings of the Trial Examiner on these points certified as a part of the Record in the Circuit Court of Appeals. The Commission took no exception to the Trial Examiner's Report. All reference to it is stricken from the record on the objection of the Commission that it is entirely irrelevant to these proceedings. This is the subject matter of the first opinion by the Circuit Court of Appeals (R. 1056) 63 F. (2d) 108.

During the corporate life of the holding company, the sales policies and practices of each of the manufacturing companies were not changed or modified in any respect; the holding company, whether by its stockholders, officers, employees or agents, in no way sought to direct nor did it direct the sales policies or efforts of either of the two manufacturing companies. Each of those companies maintained the same staff of officers it had before their common stocks were acquired by the holding company; each continued and increased its own sales force. During this period neither Arrow nor Hart & Hegeman instructed its salesmen to avoid securing business at the expense of the other company. To the contrary, each company put increased pressure upon its salesmen to get business wherever it was to be had. (R. 340-341, 359-362, 368-370, 443-447, 449-450, 477-478, 481-482, 538-540, 684-685, 692-694, 713, 720-729, 792-793, 808-819, 942-943; Com. Ex. 18; Petitioner's Ex. 32. See also testimony of Jobbers called by Commission. R. 568-581, 593-676; 976-998, 1007-1030).

Such competition as existed between the two companies was stimulated by the formation of the holding company, —each manufacturing company was on its own to make a creditable showing and each tried harder than ever to outdo the other. Each salesman was judged upon the business he secured regardless of its source. He had no incentive whatever not to take business from the other company; rather, due to pride of organization and often to jealousy, as well as to expected remuneration, he had positive and personal incentive to secure business whatever might be the effect upon the other company. The officers of both companies considered that the absolute independence in sales efforts of the two companies was sound business and the only means whereby the tremen-

dous good will value attaching to the respective "Arrow" and "H. & H." brands could be kept alive. (See citations to preceding paragraph).

During the life of the holding company, the manufacturing companies were wholly separated; they had separate offices and plants; they had no identity in directors, officers or employees; their books, records and files were kept separately. (R. 348-361, 441-449).

After the organization of the holding company, however, no time was lost in putting into effect a programme looking to economies and improvements in manufacture (that having been the purpose of the affiliation) which were made possible through the greater use of mass production, through the elimination of many wasteful methods, through the pooling of engineering talent and through increased manufacturing efficiency in general. It is estimated that the major economies for the year 1928, made possible by the affiliation amounted to upwards of $442,000; many other economies, intangible in nature and incapable of measurement in dollars, were also doubtless realized in that year. Still other economies were in process at the time of the dissolution of the holding company. (R. 311-312, 347-350, 440-447, 561-562, 750-788, 835-858).

The programme of economies and improvements was carried out between the two operating companies, as well as all dealings between them in the period involved, upon a strictly business basis. (R. 348-350, 360-361). There is, for example, the matter of the economy achieved in the manufacture of socket, attachment plug and receptacle material, which economy amounted to upwards of $282,000 for the year 1928. (R. 847-848). Hart & Hegeman had been primarily a manufacturer of snap switches and allied articles such as wall plates. In order, however,

to be able to offer a complete line of electrical wiring devices to the public it had acquired the output of a company, namely, the H. T. Paiste Company of Philadelphia, which primarily manufactured socket, receptacle and attachment plug material. (R. 962). At the time of the formation of the holding company, Hart & Hegeman owned the capital stock of the Paiste Company. While the addition of the Paiste product to its own gave Hart & Hegeman its desired full line of electrical wiring devices, this product never worked satisfactorily. The entire Paiste line yielded Hart & Hegeman no profit; moreover, it was a line which failed to measure up to the excellent standards of the "H. & H." switch line. Following the formation of the holding company, then, the Paiste plant in Philadelphia was discontinued. Much of the Paiste Company's machinery, equipment and inventory was bought by Arrow at a fair price, i.e. book value. Arrow had been primarily a manufacturer of sockets, receptacles, attachment plugs and closely allied articles, —it was in this field that it had been particularly successful. (R. 347, 365, 750-751). Thereafter, Arrow manufactured for and sold to Hart & Hegeman, at a reasonable price, its needed supply of sockets, receptacle and attachment plug material. Under this arrangement, both companies were able to realize substantial benefits. (R. 563-564, 792-793, 803-814).

The programme of economies and improvements referred to called for some interchange of employees between the two companies, but where an employee was lent from one company to the other his time was paid for by the borrowing company. In short, as we said above, all transactions between the two companies were on a business basis, a fact which the Commission carefully omitted to state in its Findings (Par. Six) describing some of those transactions.

As in the case with the later formation of the petitioner, the formation of the holding company not only was not injurious to the public interest, but, on the contrary, was beneficial to it. (R. 348-350, 700-706, 730-732, 750-788, 792-798, 827-828, 835-858, 964-966; petitioner's physical exhibits 1-28). By virtue of economies and improvements in manufacture realized, substantial reductions in prices and improvements in quality were made possible, and many others were in prospect. Moreover, the opportunities for pioneering research work were greatly augmented through the cooperation of the two engineering departments.

Further, as a result of the affiliation the lines of both companies were strengthened. Thus, the "H. & H." line was strengthened in respect to sockets, receptacles, attachment plugs and allied articles, while the "Arrow" line was strengthened in respect to its switches and allied articles, and, as a consequence, the salesmen of each line were enabled to compete more effectively against one another as well as in the field generally. (R. 792-795, 813-815, 821).

Dissolution of the Holding Company:

The original complaint in this action, charging the holding company with a violation of section 7 of the Clayton Act because of its acquisition of the common stocks of the two manufacturing companies was issued on March 3, 1928. In an appearance before the Commission's Board of Review, the holding company unsuccessfully sought a dismissal of this complaint. It then became apparent that; regardless of the legality of the company's position—in which it thoroughly believed—long, costly litigation, very disturbing to business, was in sight. (Com. Ex. 43).

To those in interest, this was regarded as an intolerable situation, especially because it seemed that the *mechanism* of affiliation rather than the affiliation itself was under fire—an original merger, for example (a step more drastic than the formation of a holding company), would have been legal—and a continuance of this situation, in addition to the cost and embarrassment involved, would only have jeopardized, and at the very least delayed, the two companies in working out their problems along such unquestionable lines as they might wish to choose.

It was decided, therefore, to dissolve the holding company and to distribute its assets. Since the alleged guilt of this company lay in its acquisition of the common stocks described, it seemed obvious that the procedure determined upon would purge whatever guilt there possibly could be and, at the same time, put an end to a harassing prosecution, the basis for which would be gone.

Accordingly, the Board of Directors of the holding company at a meeting held November 10, 1928, unanimously passed the following vote (R. 60):

> "*Voted:* That the corporate existence of this corporation be terminated and that a special meeting of the stockholders be called to be held December 10, 1928 to confirm this vote."

On the same day, a call of a special stockholders' meeting for December 10 to confirm the above vote, to authorize the directors to distribute the assets of the corporation in such manner as they might determine and to transact any other business proper to come before such meeting was sent to each of the stockholders (R. 60) together with an explanatory letter from the president and vice-president and a form of proxy and consent (R. 61). In the letter referred to, the president and vice-president

said, among other things, that the entire assets of the corporation consisted in shares of the common stocks of Arrow and Hart & Hegeman which, it was expected, would be distributed so that each stockholder would receive shares of the common stock of either one or both of the said companies; also they stated their belief that, upon distribution of the corporation's assets, the directors of Arrow and Hart & Hegeman would propose to their respective stockholders an agreement of consolidation of these two companies, pointing out that much progress had been made in efficiency and economy through the organization of the holding company and that more, in their opinion, could be accomplished by actual merger and consolidation of the two companies. Exhibit A. (R. 60-62).

For the purposes of deciding the issues of law involved, we believe that the dissolution of the holding company, along with a distribution of its assets, and the later formation of the petitioner through merger can be treated as if the steps in contemplation, set forth above, had actually been taken directly. They were, however, for tax purposes, taken through the formation of two other companies which, in order to avoid confusion of names, we shall call the "tax companies."

The Tax Companies:

Between November 10, 1928 and December 10, 1928, the date set for the stockholders' meeting of the holding company, its directors were informed by counsel that the proposed distribution to its stockholders, of whom there were some nine hundred and fifty, might involve them with the Treasury Department of the United States in the matter of large claims for income tax. Because of this possibility, the advice of one of this country's leading tax

authorities, was sought. He advised against the plan of dissolution proposed and, in lieu thereof, and for tax purposes only, suggested a plan of dissolution and subsequent merger which, if followed through, would be regarded by the Treasury Department as a general reorganization within the meaning of the Income Tax Law. His suggested plan was the one actually followed. (R. 135, 63, 943-944).

In essence that plan contemplated the formation of two "tax companies" one by Arrow and one by Hart & Hegeman. To the Arrow tax company all the shares of the common capital stock of Arrow, then held by the holding company, would be transferred and, in consideration for this transfer, that tax company would issue all of its own capital stock to the stockholders of the holding company. Likewise to the Hart & Hegeman tax company would be transferred all the shares of the common capital stock of Hart & Hegeman, then held by the holding company, and, in consideration for this transfer, that tax company would issue all of its own capital stock directly to the stockholders of the holding company. These stockholders would thus receive not a distribution in kind of the assets of the holding company but the stock of the two tax companies.

This having been done, the holding company would have no assets and no reason for continued existence; accordingly, it would be at once dissolved. There would then be left four corporations, namely, the two manufacturing companies and the two "tax" companies, who might do what they chose. (R. 63-66).

At a special meeting of the Board of Directors of the holding company on November 30, 1928 (R. 135) the plan of reorganization above outlined was presented by the president, and it was there voted to submit this plan

to the company's stockholders for consideration and adoption at a special meeting to be called for December 6, 1928. On December 1, 1928, the call for this special meeting was sent out together with a form of power of attorney, consent and proxy and also with an explanatory letter signed by the president and vice-president (R. 63). At this special meeting the plan for reorganization, described above, was approved (R. 68). The transfer of the corporation's assets to the two tax companies followed,—the common stock of Arrow going to the Arrow tax company and the common stock of Hart & Hegeman going to the Hart & Hegeman tax company. (R. 144-146, 186-190, 798-800, 878-881; Com. Ex. 45, 46, 48; Petitioner's Ex. 29, 30, 32, 42).

On December 10, 1928, at a special meeting of the stockholders of the holding company, it was voted, in confirmation of the directors' recommendation, to terminate its existence (R. 76-78); on that date a preliminary certificate of dissolution was filed with the Secretary of the State of Connecticut and notice of such dissolution was advertised as required by law. (Petitioner's Exhibit 32; R. 959; Com. Ex. 57, 58).

From and after December 6, 1928, the day on which the holding company divested itself of all of its assets, it had no power of any description over the two manufacturing companies, or over the two tax companies which were then wholly free and independent companies subject to no commitments for future affiliation or otherwise; the holding company, before dissolving, and solely to meet a tax situation, had recommended a method of non-taxable reorganization, involving ultimate merger between the two companies named, and had taken such preliminary steps as were deemed essential to make such a non-taxable reorganization possible; it had not, how-

ever, directed a merger nor did it have the power to do so,—any ultimate merger rested solely in the hands of the stockholders of the companies concerned, including the holders of the preferred stocks. (See petitioner's Exhibit 32 which is the complete corporate record of the holding company. R. 942-944).

The Merger:

Under an agreement of merger or consolidation (R. 200-217) on December 31, 1928, the merger took place and this petitioner came into existence. Neither of the manufacturing companies had considered it or had taken action upon it until *after* the holding company had distributed all of its assets (December 6, 1928) and gone into dissolution (December 10, 1928). The merger, in conformance with Connecticut legal requirements, was effected as follows:

On December 11, 1928, the Board of Directors of each company (other than the holding company which was then dissolved) approved and signed individually the form of merger agreement and ordered a special stockholders' meeting for the purpose of considering that agreement. Stockholders' meetings for each of the four companies were held on December 31, 1928. The merger agreement was approved by each and thereupon, after proper certification to the Secretary of State, the merged corporation came into being. (Exhibits E to J, both inclusive, R. 83-220, 800, 879, 951-952, 958-959).

The holders of the preferred stocks of Arrow and Hart & Hegeman, which constituted nearly 73% of their total capitalization, were in no way concerned with the organization or dissolution of the holding company, or with the formation of the tax companies, or with the transactions involving those companies. They were given no notice of

any of these matters and they had no notice of the proposed plan of merger until the call for the stockholders' meeting of December 31, 1928, which was sent out on December 11 of that year. Under Connecticut law (R. 218) the merger could not have been effected without the concurring vote of at least two-thirds of the preferred stock of Arrow and Hart & Hegeman. This fact (along with the facts recited in preceding paragraphs) is important in examining the validity of the Commission's conclusion that the holding company formed the petitioner. (R. 200-217, 938-939; Com. Ex. 52, 53, 56, 70, 71, 77; Petitioner's Ex. 29, 30, 32).

On January 11, 1929, counsel wrote a letter to the Commission (R. 221) informing it of the dissolution of the holding company, and of the subsequent incorporation of the petitioner. *From the time of the receipt of that letter until the filing of the supplemental complaint on June 29, 1929, no objection or protest of any kind was received from the Commission or from its Counsel as to the events which had transpired.* (R. 221-222, 950-951).

On April 11, 1929, the Trustees in liquidation of the holding company filed the final certificate of dissolution with the Secretary of State of Connecticut (R. 81). Under the law, such final certificate could not be filed until four months had expired from the filing of the preliminary certificate, this being the time allotted for the presentation of claims to the Trustees. During this period of time no claims were presented. (R. 81).

Before the merger took place the essential facts were laid before the Department of Justice of the United States to determine whether or not it would find it objectionable under any of the anti-trust laws. While the Department was unwilling to foreclose itself from pos-

sible future action, it nevertheless, upon the facts presented to it, found no illegality in the proposed merger. (R. 945-948; Petitioner's Ex. 35, 34).

Immediately following the merger resulting in the creation of the petitioner, a general and physical consolidation of offices, plants, equipment, records, general assets, etc., took place. However, still intent upon preserving the "Arrow" and "H. & H." brands of goods—the very life of the company largely hinging upon the good will values attaching to these two brands—the sales organizations were, and today are, organized into the Arrow Division and the H. & H. Division. Each Division has its own salesmen. There is an Arrow catalogue and an H. & H. catalogue. While there is now one general sales manager for the company, and while there are now joint branch sales managers, the actual selling of the petitioner's products with unimportant exceptions, is in the hands of "Arrow" salesmen and "H. & H." salesmen who sell their respective brands of goods in competition with one another and in precisely the same manner which had prevailed before the merger and for many years prior thereto. The exceptions referred to involve four small territories, one of them Connecticut, also Springfield, Massachusetts (just over the Connecticut line), wherein joint salesmen operate, that is, one salesman for each territory. Special considerations, not typical of the business otherwise, gave rise to these joint salesmen. Omitting discussion of Connecticut, which presents only an *intra* state question, the principal reason for combining salesmen in the other three territories was one of economy. The petitioner could not afford two salesmen in each of these territories; it is only by virtue of joint salesmen that the "Arrow" and "H. & H." brands can be pushed there at all. In any case, the amount of busi-

ness produced by all of the joint salesmen (including the Connecticut salesman) has been in the small ratio of approximately 3.3% to the total business of the company. (R. 859-862, 965-966).

The merger worked no injury to the public. There is no evidence in the Record, nor does the Commission find, that it did. On the contrary, overwhelming and undisputed evidence shows that this merger has affirmatively benefited, and will continue to benefit, the public. (See record citations on this point; *supra,* p. 18).

As a result of the merger, the petitioner has been enabled to offer a substantial portion of its articles of manufacture to the public at progressively lower prices; to improve the quality of a substantial portion of these articles without raising the price, improvement in quality having chiefly to do with safety factors, increased efficiency, better design, etc.; with respect to many articles, to reduce prices while at the same time materially improving quality; to build up an engineering department which, for original experimentation and general excellence of work, has no superior in the country; and to continue a distribution of "Arrow" and "H. & H." products in certain territories to which one or both of these brands might otherwise have been lost. Huge economies, the pooling of executive, technical and engineering resources, increased efficiency generally and the extended application of mass production methods, all made possible by the consolidation of the two companies, are responsible for these benefits which the public have reaped. (See paragraph Eighth of Finding, R. 256-258; also R. 700-706, 730-732, 750-788, 964-968).

Upon the foregoing facts, there never was and is now no basis for the Commission's prosecution of the petitioner under section 7 (or under any section) of the Clay-

ton Act, nor for its Order against the petitioner. Even if the public had been injured, even if competition in the industry had been threatened and, indeed, even if an actual monopoly had arisen, this would still be true. The Clayton Act does not apply to mergers.

The Findings of the Commission:

As we said at the outset, there can be no real dispute about the underlying facts of the case. An examination of the entire record will disclose, we believe, no substantial conflict in evidence. Our chief complaint against the Commission's Findings is that they are inadequate and misleading in that they omit major facts indisputably established by the evidence and in that they only half-state still other facts so as to lead the reader to erroneous or inadequate conclusions.

It is clear that, as we stated above (p. 4), the Courts may and do take into consideration, as decisive of the controversy, "certain material facts not covered by the findings" and enquire as to "whether there are material facts not reported by the commission".

A few instances will illustrate the lack of completeness of the Findings.

In Paragraph Seven (R. 255-256) it is found that "the total volume of sales of both the said Arrow Electric Company and the said Hart and Hegeman Manufacturing Company during 1927 was in excess of 25 per cent." (incidentally an overstatement) "of the total volume of sales of all manufacturers of electrical wiring devices of all descriptions during that year", but no mention is made of the fact that in 1929 the combined percentage of these two companies had dropped to less than 19% of the industry. (See *supra*). (R. 872, 875, 902, 904).

The first sub-paragraph of Paragraph Six (R. 252) has obviously been framed to create the impression that during the life of the holding company competition between the two operating companies was suppressed or at least substantially affected. Close analysis of the statements made by no means dictates this conclusion (but only the conclusion that economies were effected) but the making of them could hardly have had any other relevant purpose. In what it omits to state, however, the Commission is even more gravely at fault. This one sub-paragraph is the only part of the Finding which deals with the situation during the entire corporate existence of the holding company, from October 1927 to December 1928, yet it discloses nothing of the situation as it then existed. In the face of abundant and uncontroverted evidence upon this subject, it omits to state that all of the transactions between the operating companies referred to in the paragraph were conducted on a strictly business basis; that the holding company was not formed for the purpose of influencing competition but rather to achieve a manufacturing affiliation between the two operating companies; that during its life the separate organizations of these two operating companies, as they had always existed, remained intact; and that the holding company never took action to direct or control the sales policies of the two operating companies; that, in short, competition during the life of the holding company not only continued unabated but, if anything, was intensified. (See *supra*, pp. 12-16).

In this same sub-paragraph the Commission's statement that Mr. Grier and Mr. Williams were authorized to vote all of the shares of stock of the two operating companies, while of no great moment, is misleading, as its own Exhibit No. 39 shows. Mr. Grier, vice-presi-

dent of Arrow and/or Mr. Perkins of that company were authorized to vote *its* common stock while Mr. Williams, president of Hart & Hegeman and/or Mr. Gross, counsel for that Company, were authorized to vote *its* common stock,—in other words, the real point of the whole proceeding was that the holding company took especial care to leave the management of the two operating companies to their own officers.

Further in the same Paragraph Six, it is found that under the petitioner, resulting from the merger, during the years 1930 and 1931 (an incorrect statement as to 1930) joint salesmen of "Arrow" and "H&H" were employed in certain territories, but the special reasons for their employment and the small extent of the business they produced are omitted. (See *supra* pp. 25-26).

Still further in the same Paragraph Six it is found that some new items manufactured by the petitioner bear the combined trade-mark "Arrow-H & H", but no mention is made of the fact that, properly speaking, this is no trademark at all, being rather a use of the petitioner's name, that unusual considerations govern its use, that there has been no change, actual or contemplated, as to the use of the two brands "Arrow" and "H & H" and that the items in question are only two out of several thousand manufactured by the petitioner. (R. 796-798; Com. Ex. 81, 82).

We think the futility of arriving at a satisfactory statement of the facts through the patchwork method of discussing each of the Findings of the Commission is apparent. Our effort, therefore, has been to draft a more complete statement from the record itself and in this way to lay a proper foundation of the real issues of the case, namely, those of law.

SPECIFICATION OF ERRORS

As stated in our brief in support of our petition for writ of certiorari, Pages 11 and 12, we respectfully submit that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the petitioner violated section 7 of the Clayton Act notwithstanding the fact that neither it, nor the holding company which existed prior to its formation, ever caused injury to the public but, on the contrary, benefited it.

2. In holding (a prerequisite to its judgment against the petitioner) that the holding company violated section 7 of the Clayton Act in acquiring the common stocks of the Arrow and the Hart & Hegeman manufacturing companies.

3. In holding that the holding company organized the petitioner.

4. In holding that, under sections 7 and 11 of the Clayton Act, the Commission has jurisdiction over the petitioner, a corporation which never acquired, held, owned or controlled a single share of the capital stocks of either the Arrow or the Hart & Hegeman manufacturing companies.

5. In holding that the Commission has the power, under section 11 of the Clayton Act, to order the petitioner to divest itself of physical properties which it acquired, not through the use of capital stock, but by virtue of the physical merger which brought it into being.

6. In holding that, except as it may be incidental to an order directing stock divestment, section 11 of the Clayton Act confers power on the Commission to

direct a corporation to divest itself absolutely of physical properties.

7. In holding that the Commission's order, which if carried into effect would cut the petitioner in two, may disregard and virtually confiscate the property rights of the greatly preponderant group of preferred stockholders who played no part in the organization or life of the holding company.

8. In affirming the order of the Commission.

SUMMARY OF ARGUMENT

1. The transactions complained of by the Commission in this case did not constitute a violation of Section 7 of the Clayton Act since, in the first place, they involved no injury to the public.

This topic covers Point 1 of our Specifications of Error.

It is our position that public interest is paramount under a Clayton Act as well as under a Sherman Act prosecution—that the rule of reason, so-called, has as logical an application to the one act as to the other.

International Shoe Co. v. *Federal Trade Commission,* 280 U. S. 291, 1930;
Appalachian Coals, Inc. et al v. *U. S.,* 288 U. S. 344, 1933.

2. Whether or not the rule of reason be held applicable to the Clayton Act, the holding company did not violate that Act in acquiring the common stocks of the two manufacturing companies; consequently there is no possible basis for prosecution of the petitioner.

This topic covers Point 2 of our Specifications of Error.

The mere acquisition by one corporation of stocks of competing corporations is not *per se* illegal; yet, upon no other theory, was the holding company in the case at bar guilty.

International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 1930;
Temple Anthracite Coal Co. v. *Federal Trade Commission*, 51 F. (2d) 656, (C. C. A. 3) 1931;
Federal Trade Commission v. *Thatcher Mfg. Co.*, 5 F. (2) 615, 622 (C. C. A. 3), 1925;
Aluminum Company of America v. *Federal Trade Commission*, 284 Fed. 401, 405, (C. C. A. 3), 1922;
V. Vivaudou v. *Federal Trade Commission*, 54 F. (2) 273 (C. C. A. 2), 1931;
See also:
Standard Fashion Co. v. *Magrane Houston Co.*, 258 U. S. 346, 356, 1922.

3. The Commission's Order in this proceeding is without jurisdictional warrant.

This topic covers Points 4, 5, 6 and 7 of our Specifications of Error.

The essence of the Commission's order (R. 261) is its direction to the petitioner—a corporation formed through merger, and not a holding corporation—to divest itself absolutely of physical properties. Carried into effect, the petitioner would be cut in two, with little hope of either part surviving. Not only does this order disregard the rights of the common stockholders, but it is confiscatory of the rights of the petitioner's preferred stockholders—stockholders who were not involved in the holding company and whose vote was necessary to the merger.

Notwithstanding the claims of the Commission, the petitioner never did acquire or use any capital stocks of the Arrow or the Hart & Hegeman manufacturing com-

panies in violation of Section 7 of the Clayton Act. That part of the order (R. 262) which directs a divestment of such stocks is meaningless.

It is our position that the Commission can find no warrant for its order in the Clayton Act, nor in any case decided thereunder.

Thatcher Manufacturing Co. v. *Federal Trade Commission*, 272 U. S. 554, 560, 1926;
Swift and Co. v. *Federal Trade Commission*, 272 U. S. 554, 561, 1926;
Federal Trade Commission v. *Western Meat Co.*, 272 U. S. 554, 1926.

4. As a matter of law the holding company did not organize the petitioner, which was formed through merger of four companies not including the holding company.

This covers Point 3 in our Specifications of Error.

A detailed analysis of the facts in the corporate records of the various companies demonstrates that the conclusion of the Commission, affirmed by the Court below, is not sound as a matter of law. The holding company had gone into dissolution before a single step was taken toward the merger of the two manufacturing companies and the two tax companies, and the holding company in no way directed or controlled the action of any of those merging companies in what they did to consummate the merger. This being so, the Commission has no possible jurisdiction over the petitioner.

ARGUMENT

I.

The transactions complained of by the Commission in this case did not constitute a violation of section 7 of the Clayton Act since, in the first place, they involved no injury to the public.

There is no question but that the transactions complained of by the Commission in this case not only did not injure, or tend to injure, the public in fact but, on the contrary, affirmatively benefited it. There is no dispute in the record on the subject. By virtue of the formation of the holding company, the manufacturing companies were enabled to effect great economies and to work many improvements in their manufacturing processes. These were reflected directly in lowered prices and improved quality of merchandise offered to the public. With the merger of the two manufacturing companies into the petitioner identical benefits were realized, and will continue to be realized, by the public. In addition, the merger has made possible the continued offering of both the "Arrow" and "H & H" lines in territories to which one or both of them might otherwise have been lost.

As to monopoly, it has been pointed out (*supra*, page 7) that in 1927 the combined business of the two manufacturing companies amounted to approximately twenty-four per cent of the total business of the electrical wiring device industry while in 1929 it had dropped to less than nineteen per cent thereof; also that the petitioner has some seventy active competitors, including such powerful corporations as the General Electric Company and the Bryant Electric Company (Westinghouse). The Court below finds no tendency towards monopoly, but

fails to remark upon the 1929 figures which show that the actual tendency has been *away* from monopoly.

The transactions complained of have not restrained, or tended to restrain, trade in the electrical wiring device industry. Not only did the Commission produce no witness, whether competitor, jobber or ultimate consumer, who complained against the petitioner on this score, or on the score of tendency to monopoly, but the petitioner itself called as witnesses two of its principal competitors who gave it unequivocal acquittance in the matter. (R. 691-750).

Under these circumstances, is a prosecution under section 7 of the Clayton Act proper? It is respectfully submitted that the affirmative answer of the Circuit Court below erroneously construes this Act, and is in direct conflict with principles enunciated by this Court, more especially in *International Shoe Company* v. *Federal Trade Commission,* 280 U. S. 291, 74 L. ed., 431, and note, 1930, and in *Appalachian Coals, Inc., et al* v. *United States,* 288 U. S. 344, 1933.

In the first case named, the International Shoe Company acquired all of the capital stock of the McElwain Company. This acquisition was attacked by the Commission under section 7 of the Clayton Act. It appeared that in respect of 95% of the business of the two companies there was no competition; also that, at the time of the acquisition complained of, the McElwain Company was in failing circumstances and that its actual failure would have resulted in loss to its stockholders and injury to the communities where its plants were operated. Although section 7 of the Act involved makes no reference to such contingencies or to the public interest generally, this Court held that there had been no prejudice to the public within the meaning of the Act (280 U. S., 297-8, 302-

3) and that the Shoe Company was not guilty of violating it.

The essence of that decision, we submit, is the absence of injury to the public. This Court simply carried to the Clayton Act, as it had previously carried to the Sherman Act (15 U. S. C. A., sec. 1), the rule of reason. Neither act, it should be especially noticed, makes any mention of the public interest. Logically, there can be no reason for holding that the actual absence or presence of injury to the public shall be of paramount importance with respect to one act but not with respect to the other.

Among other things, this Court says in its opinion, at pages 297-8:

> "Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In *Standard Oil Co.* v. *Federal Trade Commission,* 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that *the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade.* In *Federal Trade Commission* v. *Sinclair Co.,* 261 U. S. 463, 476, referring to the Clayton Act and the Federal Trade Commission Act, this Court said:
>
> 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.'
>
> "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals

only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357; *that is to say, to such a degree as will injuriously affect the public.* Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, *to begin with,* is itself without real substance." (Italics ours).

The Court below, in the present case, adopting the argument of the Commission, has interpreted the *Shoe* case to mean that the public *ipso facto* is injured where, as in the case at bar, the products of the two corporations involved were in substantial competition with one another, i.e., 59% of the products of the Hart & Hegeman company were in competition with the products of the Arrow company (65 Fed. (2d), 340). We believe this interpretation to be untenable. In the *Shoe* case it was held that there was no infraction of the Clayton Act because there had been no injury to the public; that the public had not been injured because it had no concern in a lessening of competition which, *"to begin with,"* was insubstantial, *also* because the company whose stock was acquired was in failing circumstances. Each of these reasons was held to be adequate in itself (opinion, p. 303). There was no need to push the inquiry further. The Court below entirely overlooks the fact that, in resolving the question of the presence or absence of injury to the public, this Court did not confine itself to an examination of the competitive situation which had existed between the two companies. The test announced in the *Shoe* case obviously is: has the public been injuriously affected by the stock acquisition complained of? It is the test, not the factual situations of a particular case, which is important.

The position taken by the Commission, and affirmed by the Court below, is reminiscent of that taken by the Government in prosecutions brought by it under the Sherman Act (15 U. S. C. A., sec. 1) before the promulgation of the rule of reason in *Standard Oil Company* v. *United States,* 221, U. S. 1, 49, et seq., 1911. Section 1 of that Act, it will be recalled, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

In the *Standard Oil* case counsel for the Government argued that this rigid language (more rigid indeed than that of section 7 of the Clayton Act) embraced *every* contract, combination, etc., in restraint of trade, and hence that its text left no room for the exercise of judgment but simply imposed the plain duty of applying its prohibitions to every case within its literal language. (221 U. S. 63). The Court, however, read into the act the now familiar rule of reason, the doctrine that only such restraints as were harmful to the public should be condemned. While the Court thus departs from the literal wording of the Act, its construction is an eminently reasonable one, recognizing as it does that a standard of interpretation was contemplated and required, and that the administration of an act framed in the public interests should not be blind to actualities but should seek only to guard and promote those interests in fact.

The Federal Trade Commission, though now faced with the *Shoe* case (which it seeks to bend in its own direction), nevertheless continues to argue for a blind, harsh and inflexible construction of section 7 of the Clayton Act, and the Court below has found this argument valid. The argument runs substantially thus: section 7,

which was passed in the public interest, condemns every corporate stock acquisition the effect of which may be to substantially lessen the competition existing between two or more corporations; therefore, by legislative fiat, any such acquisition is *per se* injurious to the public and illegal and the Courts are without power to inquire into the actual facts. There is a perfect parallel between this argument and that formerly taken by the Government in prosecutions based on the Sherman Act. The argument can have no more validity in the one case than in the other. Consequently, we submit that the decision of the Court below conflicts and is inconsistent not only with the *Shoe* case but also with that standard of legality, i.e., the standard of reasonableness, heretofore held applicable, in numerous decisions of this Court, to the Sherman Act.

In *Appalachian Coals Inc., et al.* v. *United States,* 288 U. S. 344, mentioned *supra,* a case arising under the Sherman Act, an agreement, or combination, between 137 coal producers, under which competition between them would be blotted out, was held legal since no injury to the public appeared. Question was raised as to whether, in attaining their objectives, these companies should not have integrated their properties under one ownership to be within the law. This Court (page 377) held that substance, not form, was the important thing. In the case at bar, the Circuit Court of Appeals below regards form, not substance. Ignoring the realities, it finds injury to the public only in the machinery of affiliation employed. However, whether a case arises under the Sherman Act or under the Clayton Act, we find the same public, with the same interests, in the background. The position that an affiliation or consolidation injures or does not injure the public according to whether it

proceeds by way of a holding company or by way of merger is untenable. It is a matter of common knowledge that a merger is the more sweeping procedure and hence the more likely to affect the public interests in fact. Yet in this case, it has never been disputed that these two manufacturing companies could have legally merged in the first instance. And the sole ground for these proceedings against the petitioner alone, which is the merged company, is that a holding company was first formed and dissolved after complaint made, the merger following. That proves conclusively, if true, that the case turns upon a matter of form and not of substance.

In the *Appalachian* case, *supra,* this Court, among other things, said:

> "Realties must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains' ". (288 U. S. 360).
>
> "The court below found that, as between defendants themselves, competition would be eliminated. . . . The more serious question relates to the effect of the plan upon competition between defendants and other producers." (288 U. S. 367).
>
> "Consumers testified that defendants' plan will be a benefit to the coal industry and will not restrain competition. . . . There was similar testimony by wholesale and retail dealers in coal. . . . Competing producers testified that the operation of the selling agency, as proposed by defendants, would not restrain competition and would not hurt their business." (288 U. S. 370).

"With respect to defendant's purposes, we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. (288 U. S. 372).

"In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets." (288 U. S. 375).

"Defendants insist that on the evidence adduced as to their competitive position in the consuming markets, and in the absence of proof of actual operations showing an injurious effect upon competition, either through possession or abuse of power, no valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. *United States* v. *United States Steel Corporation*, 251 U. S. 417; *United States* v. *International Harvester Company*, 274 U. S. 693. We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures." (288 U. S. 376).

We submit that these principles of law must control, whether the complaint is based on the Sherman Act or on the Clayton Act.

The Commission produced not one jobber, not one ultimate consumer, not one competitor who found the affiliation of the Arrow and Hart & Hegeman companies objectionable; the petitioner, on the other hand, deliberately produced two of its principal competitors—the General Electric Company and the Bryant Electric Company (a subsidiary of Westinghouse), each represented by a qualified officer—who found the affiliation and later merger of the two companies beyond criticism. (R. 691-750).

What is in the public interest or what is opposed to it is to be arrived at realistically, not through scholastic reasoning addressed to the bare words of the law in the manner followed by the Commission.

The transactions complained of by the Commission in this case are no more opposed to the public interests than were those complained of by the government in the *Appalachian* case. On the public interests score alone, then, the Commission's Order should be set aside.

II.

Whether or not the rule of reason be held applicable to the Clayton Act, the holding company did not violate that act in acquiring the common stocks of the two manufacturing companies; consequently there is no possible basis for prosecution of the petitioner.

If, as the Court below and the Commission have necessarily ruled, the question of actual injury to the public is immaterial in a prosecution based on section 7 of the Clayton Act (15 U.S.C.A. sec. 18), the question yet remains as to whether or not the acquisition by one corporation (not solely for purposes of investment) of all or a substantial part of the capital stocks of two or more

solvent corporations engaged in commerce, and in substantial competition with one another, is *per se* illegal under the act. Unless this question can be answered in the affirmative—and this is of necessity the answer of the Court below, as well as the Commission—, there was no guilt attaching to the holding company by virtue of its acquisition of the common stocks of the two manufacturing companies. And of course a preliminary hurdle to any judgment against the petitioner is the finding of guilt in the holding company. If its acquisition of the stocks in question was legal there can be no challenge of the supervening merger resulting in the petitioner. Merger does not lie within the scope of the Clayton Act.

As to the guilt of the holding company, we call attention to the fact that it was formed to acquire, and did acquire, the common stocks of the two manufacturing companies not for the purpose of suppressing the competition which existed between them but for the sole purpose of effecting economies and improvements in manufacture while, at the same time, preserving the competition described, and that, during the entire corporate life of this holding company, which was from early October of 1927 to early December of 1928, the sales policies and practices of the two manufacturing companies continued as always before, wholly uninfluenced by the holding company. (See *supra,* pp. 12-17).

"Competition", says the Court below, "is eliminated where two formerly competing units are brought under one dominating ownership." (65 F. (2d), p. 340).

As to this, it is well to examine carefully the act in question, the pertinent paragraph of which reads:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other

share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The language of this paragraph precludes the idea that the acquisition of stock alone is illegal. Congress did not say, as it surely would have done had it been so minded, that the acquisition by Company X of the capital stocks of competing companies Y and Z is *per se* unlawful; it was concerned not with the power, potential or otherwise, which might vest in Company X but rather with the question of whether that power was aimed at, and would probably bring about, a substantial lessening of competition.

In *Temple Anthracite Coal Company* v. *Federal Trade Commission,* 51 F. (2d) 656, 1931 (C.C.A. 3) the Temple Company acquired substantially *all* of the capital stocks of two coal corporations which were engaged in commerce and whose products were apparently 100% competitive. The Commission prosecuted under section 7 of the Clayton Act, finding the holding company guilty. However, the Circuit Court of Appeals found that, notwithstanding the power which might reside in the Temple Company as a result of its acquisition, the competitive situation had not been affected in fact. "The only effect which the ownership may be found to have brought about is the reduction of overhead and operating expense." (51 F. (2d) 660). The company was accordingly given a complete acquittance. *The Commission did not carry the case farther.*

It may be argued that the *Temple* case does not parallel the case at bar because, in the case at bar, the lower Court finds that the holding company organized the petitioner (which it did not do; *supra* pp. 18-24 and *infra* pp. 51-57) and that, under the petitioner, competition between the two former manufacturing companies ceased. The argument, however, is superficial. If the holding company did not violate section 7 of the Clayton Act in acquiring the common stocks of the two companies named, then it never did violate it, even taking the Court's finding mentioned just above. The chain of events entailing dissolution of the holding company and subsequent formation of the petitioner through merger was not the natural or probable outcome of the stock acquisition complained of, —it was precipitated solely because of the Commission's election to prosecute. (See *supra,* pp. 18-19).

It is the probabilities attending a stock acquisition with which the Clayton Act concerns itself. A corporation is forbidden to acquire the stock of two or more corporations in commerce the effect of which *"may be"* to substantially lessen competition, etc. As has been said, the acquisition is not *per se* condemned. The Commission itself, in its brief to the Court below, framed the issue thus: "Was the *probable* effect of the acquisition of the common stock of The Hart & Hegeman Manufacturing Company and The Arrow Electric Company on October 10, 1927, by Arrow-Hart & Hegeman, Inc. (the holding company) (a) to substantially lessen the competition . . ." etc.?

Probable effect, naturally, must be determined as of the date of the stock acquisition complained of. Relevant inquiry in such a determination concerns itself with the objective behind the acquisition and the procedure by which this objective is to be attained. Supervening events

may also be relevant as an aid in showing what the objective really was and in throwing light generally upon the probable effects of the acquisition. In the *Temple* case, upon facts varying in no important particular from those of the case at bar, the Court found that probable trend towards lessening of competition, monopoly or restraint of trade had not been shown. Even should the Temple holding company now actually vote a physical merger of its two subsidiaries (of which it owns substantially all of the common stock), it is obvious that no prosecution under section 7 of the Clayton Act, regardless of the effect of such merger, would be maintainable,—this act deals only with the legality or illegality of the original stock acquisition; were the merger illegal, it would be because the Sherman Anti-Trust Act had been violated.

That acquisition by one corporation of the capital stock of a competing corporation, or of the capital stocks of two or more competing corporations, is not *per se* illegal under section 7 of the Clayton Act, we believe to be a well established principle of law, despite the decision of the Court below in the instant case:

International Shoe Company v. *Federal Trade Commission*, 280 U. S. 291, 1930;

Temple Anthracite Coal Co. v. *Federal Trade Commission*, *supra*, 51 F. (2d) 656, (C. C. A. 3) 1931;

Federal Trade Commission v. *Thatcher Mfg. Co.*, 5 F. (2d) 615, 622, (C. C. A. 3), 1925;

Aluminum Company of America v. *Federal Trade Commission*, 284 F. 401, 405, (C. C. A. 3), 1922;

V. Vivaudou, Inc. v. Federal Trade Commission, 54 F. (2d) 273 (C. C. A. 2), 1931.

See also:

Standard Fashion Co. v. *Magrane Houston Co.*, 258 U. S. 346, 356, 1922.

III.

The Commission's Order in this Proceeding is without Jurisdictional Warrant.

Section 7 of the Clayton Act (15 U. S. C. A., sec. 18), upon which this proceeding is based, addresses itself to the subject of stock acquisitions only. Under section 11 of the Act (15 U. S. C. A., sec. 21), the Commission is empowered to order a corporation which has acquired stock in violation of section 7 to cease and desist from such violation by divesting itself of the stock illegally held. The language of section 11 is no broader than this although in *Federal Trade Commission* v. *Western Meat Company*, 272 U. S. 554, 1926, it was held that, under the circumstances there described, the order directing the offending corporation to divest itself of the stock which it had illegally acquired, and which it still held, might include a direction to divest itself also of the physical properties which it had acquired through the exclusive use of such stock.

The order entered by the Commission against the petitioner in the present proceeding sweeps far beyond anything thus far sanctioned by this Court. Judge Swan, who dissented to the judgment of the Court below, was of the opinion that the Commission's order exceeded its jurisdiction (65 F. (2d) 340), as was Chairman Humphrey of the Commission who also dissented (R. 264-266). We believe the Commission itself would not claim that jurisdiction for its present order can be found in the language of the Act. Most inconsistently, the Commission finds itself in the position of urging a literal, harsh construction of section 7 of this Act while, at the same moment, requesting broad, implied powers under section 11 thereof. The Act, being in derogation of ordinary

rights, a proper construction of it would limit rather than enlarge its scope.

The Commission's order (R. 261) amounts to a bald direction to the petitioner to divest itself of physical properties. This direction is in no way incident to an order of stock divestment. The petitioner never acquired stocks in violation of section 7 of the Clayton Act; it never acquired and does not now hold, any share of the capital stocks of either the Arrow or the Hart & Hegeman manufacturing companies. At the time of its incorporation, i. e. December 31, 1928, it acquired the physical properties of these two companies through the fact of absolute merger, not through the use of their capital stocks. These two companies, indeed, ceased to exist coincidently with the merger. In its order, affirmed by the Court below, the Commission not only exceeds the powers conferred upon it under section 11 of the Act but overleaps, in the first instance, the fact that the petitioner never acquired stocks in violation of section 7.

The Commission, it should be understood, does not concede that the petitioner never itself acquired stocks in violation of section 7 of the Clayton law. Obviously conscious of jurisdictional obstacles, the Commission, in paragraph 2 of its order (R. 261-262), in an evident attempt to avoid the appearance of directing a divestment of physical properties alone, directs the petitioner to divest itself of all common stocks of the Hart & Hegeman company "acquired by it as a result of the merger" of the companies involved "so as to include in such divestment" the physical properties of this company, or, in the alternative, to divest itself of all common stock of the Arrow company thus acquired by it so as to include in such divestment its physical properties.

However, this order, and the finding upon which it is

based (R. 249-250), are so hollow as to be beyond the bounds of legitimate controversy. In the first place, although the common stocks of the Arrow and the Hart & Hegeman manufacturing companies were assets of the two tax companies involved in the merger (see *supra*, pp. 20-24), all four companies so involved ceased legally to exist coincidentally with this merger. Under Connecticut law at least (R. 218), and presumably under the law of any state, when two or more corporations merge, they merge into a single new corporation. All the stock of each one of the four consolidating companies was wiped out by the consummation of the merger and the stock of the merged company was issued in lieu of the stocks of the consolidating companies. (R. 208-211). Its preferred stock was issued share for share to the holders of the preferred stock of Arrow and of Hart & Hegeman. Its common stock was issued to the general public who held the stock of the two tax companies which also were included in the merger. (R. 208).

The petitioner, then, never acquired as assets, or otherwise, and it certainly never held and does not now hold, the stocks of the two manufacturing companies,—there can be no such thing as outstanding capital stock of a company which does not exist and whose assets have been absorbed by the merged company.

In the second place, the petitioner voted no stocks to acquire the physical properties of the Arrow and the Hart & Hegeman companies,—it acquired those physical properties by the fact of the merger which brought it into being.

Finally, this proceeding is not an original one against the petitioner; the original proceeding was against the former holding company, the petitioner having been brought into it by a supplemental complaint. Even

could the supplemental complaint be regarded as in the nature of an original proceeding against the petitioner. then it is only necessary to point out that it was instituted about six months after the stock acquisition complained of, there having been, in the meantime, a complete physical merger of the properties of the two manufacturing companies involved. The petitioner's position then would be unassailable under *Thatcher Manufacturing Company* v. *Federal Trade Commission;* 272 U. S. 554, 560, 1926 and *Swift and Company* v. *Federal Trade Commission,* 272 U. S. 554, 561.

The Commission's Order in this case, which if carried out would tear the petitioner in two (with the obvious probability that neither part could survive) quite ignores the property rights and interests of the preferred stockholders who played no part in the formation, life or dissolution of the holding company. These preferred stockholders, it will be remembered, represented nearly 73% of the capitalization of the old Arrow and Hart & Hegeman manufacturing companies. (See *supra,* page 9). By what authority may the Commission enter an order against the petitioner which is confiscatory of the property interests and rights of its preferred stockholders? In the *Western Meat* case, *supra,* p. 47, relied upon by the Commission, it is to be observed that the offending corporation had acquired *all* of the capital stock of its competitor, the Nevada Packing Company.

IV.

As a matter of law, the holding company did not organize the petitioner, which was formed through merger of four companies not including the holding company.

The Commission found that the holding company organized the petitioner (R. 258, 239-252). This finding is supported by the Court below and is the controlling factor in its decision. In his opinion, Judge Manton, among other things, says (R. 1065):

> "By the letter and the use of proxies, Arrow-Hart & Hegeman, Inc. dictated and controlled the formation of the petitioner and therefore the petitioner comes under the jurisdiction and is subject to the order of the respondent. *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554."

Up to this point in our argument, we have not taken direct issue with the conclusion that the holding company organized the petitioner; our preceding topics have been independent of that conclusion. Although the subject is treated in our Statement of Facts, *supra* pp. 18-25, we shall consider it now in greater detail. It is clear that if the holding company did not organize the petitioner all basis for any claim of jurisdiction by the Commission under the Clayton Act at once vanishes. The petitioner came into being as a result of merger. It never acquired stocks in violation of section 7 of the Clayton law. (While the Commission claims it did do so, this claim is wholly without merit, as we show *supra*, at pp. 48-50).

That the holding company did not dictate and control the formation of the petitioner can be demonstrated with mathematical accuracy from the record. The facts are

clear and undisputed. Stated chronologically they are as follows:

1. On November 10, 1928 the directors of the holding company, on the advice of counsel, recommended the dissolution of that holding company, and called a meeting of stockholders for December 10, 1928 to confirm that action. (R. 60-62).*

2. On December 1, 1928 the plan of dissolution outlined in that letter was changed, on the advice of tax counsel, so as to come within the reorganization provisions of the Income Tax Law; and a new letter went to stockholders. (R. 242-245).

In outlining that proposed plan, it was stated in that letter that a special meeting of stockholders would be held on December 6, 1928 to authorize the transfer of the common stock of Arrow and of Hart & Hegeman to two tax companies whose stock in exchange would be issued either to the holding company or directly to its stockholders. A separate proxy went out with that letter, which did not cover the dissolution meeting called for December 10, 1928, although the gentlemen named as attorneys were the same in both cases. The letter then said:

> "(b) That when such exchange of shares in conformity to the plan of reorganization, made necessary to meet the criticism of the Federal Trade Commission, as indicated in our former letter and notice,

*Exhibits A to K, both inclusive (R. 60-222), annexed to the petitioner's answer to the supplemental complaint, which are frequently cited in this chronological statement, were all introduced into evidence either by the Commission or by the petitioner under different numbers. The matters set forth in said exhibits are true and correct. (R. 958-959. A is Com. Ex. 44; B is Com. Ex. 46; C is Com. Ex. 48, 49, Petitioner's Ex. 32; D is Com. Ex. 58; E is Com. Ex. 76, 77; F is Com. Ex. 47, 56; G is Petitioner's Ex. 30; H is Petitioner's Ex. 29; I is Com. Ex. 51; J is Petitioner's Ex. 38; K is Petitioner's Ex. 37).

has been consummated, there will be no further reason for the continued corporate existence of Arrow-Hart & Hegeman, Incorporated, and therefore, at a meeting called for December 10, 1928, or at an adjournment thereof, it is anticipated that that corporation will be dissolved." (R. 244).

The letter further stated that according to the plan, immediately after the dissolution of the holding company on December 10, 1928, a merger of the "four corporations then in existence" i. e. the two manufacturing companies and the two tax companies "will be submitted to the stockholders for approval. It is hoped that if adopted this merger or consolidation will be effective at the close of business on December 31, 1928." (R. 244).

As we outline the following steps, it will be noticed that the holding company never did a thing to compel the merger, never voted the stock of the two manufacturing companies or bound them in any way to agree to a merger, and never had the power to do so, (as it did not control the preferred stocks of the two manufacturing companies, and, without the vote of the preferred stockholders, no merger could be effected), and that the petitioner never acquired the capital stocks of the two manufacturing companies. The only agreement or contract the holding company made was with the two tax companies by which they agreed to issue their stock to the stockholders of the holding company in exchange for the transfer of all its assets.

The plan itself was not a contract or agreement. By approving it, no obligation was assumed and no rights acquired.

3. On December 6, 1928 the stockholders of the holding company met, approved and adopted, but had no power to carry through, the plan. They could and did authorize the first step, namely the transfer of all the com-

mon stock of Arrow to one tax company in exchange for the issue by that tax company of all its capital stock direct to the stockholders of the holding company, and similarly, the transfer of all the common stock of Hart & Hegeman to the other tax company in exchange for the issue of all its stock of the stockholders of the holding company.

A full record of that meeting appears in the Record. (R. 68-75).

4. On December 6, 1928 the directors of the Arrow tax company voted that as the holding company had transferred to it all the common stock of Arrow in exchange for all its stock and had authorized and directed this company to issue its stock to the stockholders of the holding company in accordance with an attested list of stockholders furnished, the officers were directed to issue all the tax company stock to the stockholders of the holding company—and later in the minutes of that same meeting is the report showing that the stock had been so issued to the stockholders of the holding company. (R. 144-148, a part of the full corporate record of that company, all of which is at pages 116-157).

5. On December 6, 1928, the same proceedings were had by the Hart & Hegeman tax company as to the stock of Hart & Hegeman. The full corporate record of that company appears at pages 158-199 of the Record and the meeting of December 6, 1928 will be found at pages 186-190 thereof.

6. On December 10, 1928 the stockholders of the holding company met and confirmed the directors' vote to dissolve. (R. 76-80).

7. On December 10, 1928 a certificate was filed with the Secretary of State certifying to such action as to dissolution. Commission's Exhibit 57 (R. 329-330 folios 987-8).

8. On December 11, 1928 the directors of Arrow (R. 84-86), the directors of Hart & Hegeman (R. 102-104) and the directors of each of the two tax companies (R. 151-152; 192-194) met and considered the proposed agreement for consolidation of the four companies. In each case it was approved and signed by the individual directors and a meeting of stockholders was called for December 31, 1928 to act thereon.

9. On December 31, 1928 the stockholders of the four companies (i.e. the two manufacturing companies and the two tax companies) by a two-thirds vote of all the outstanding stock of each class voted to approve the merger.

At the stockholders' meeting of Arrow 16,026 out of 18,950 shares of preferred stock, voting separately from the common stock, approved the merger and no shares voted against it. (R. 92-100).

At the stockholders' meeting of Hart & Hegeman 11,522 out of 13,333 shares of preferred stock, voting separately from the common stock, approved the merger and no shares voted against it. (R. 109-115).

10. On December 31, 1928 the Agreement of Consolidation was finally certified and filed and approved by the Secretary of State. (R. 200-217).

This record conclusively establishes that while the plan was promulgated and recommended by the old holding company before it dissolved, it did not dictate or control

the formation of the petitioner. It did not utilize its voting power on the common stocks of the manufacturing companies. It did not and could not vote on the preferred stocks of those companies.

The distribution of the stock of the two tax companies to the stockholders of the old holding company was unconditional and without any strings.

The proxies given by stockholders were revocable at any time during the procedure and no agreement between individuals to vote for the plan was ever made.

Voting as proxies for stockholders at a meeting of the holding company did not obligate the individuals for whom they voted to vote the same way at stockholders' meetings of other corporations.

The Commission has never claimed there was any such agreement or obligation unless it were made by the adoption of the Plan on December 6 by the holding company. But that plan as outlined in the letter of December 1, (R. 63-66) expressly states that the meeting of the stockholders of the holding company will be held *"to authorize this first step in the plan"* to exchange stock with the tax companies (R. 64) and then the company will be dissolved. The same plan then states that after the dissolution, a merger will be submitted to the stockholders of the two manufacturing companies and of the two tax companies *for approval* and *if adopted* it is hoped it will be effective on December 31, and the letter closes with an appeal for support of the plan.

That procedure as outlined in that letter and carried out in the votes does not sustain the conclusion of the Circuit Court of Appeals that "by the letter and the use of the proxies Arrow-Hart & Hegeman, Inc. dictated and controlled the formation of the petitioner, and there-

fore the petitioner comes under the jurisdiction and is subject to the order of the respondent."

We respectfully submit that the Court below erred in reaching such a conclusion of law.

Respectfully submitted,

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January 13, 1934.